**JONG SZE LEE**

**v.**

**PUBLIC PROSECUTOR**

HIGH COURT BORNEO, KUCHING
CHONG SIEW FAI J
[CRIMINAL APPEAL NO. KG. 7 OF 1990]
8 JULY 1991

***CRIMINAL PROCEDURE:*** *Leave to adduce additional evidence - Medical evidence - Mental state of prosecution witness - Discretionary power of Judge - Principles and conditions - Whether available in lower Court - Onus - Criminal Procedure Code, s. 317 - Penal Code, s. 474.*

The appellant was charged with the offence of abetting PW1 in the commission of an offence under s. 474 of the Penal Code. PW1 pleaded guilty to the principal offence and was accordingly convicted and sentenced. The appellant claimed trial in which PW1 gave evidence for the prosecution. The appellant was found guilty, convicted and sentenced.

This was the appellant's application under s. 317 of the Criminal Procedure Code for leave to adduce additional evidence at the hearing of his appeal. This evidence was that of a doctor in regard to the mental state of PW1 and related to PW1's capability of adducing credible evidence at the trial in the lower Court.

**Held:**

**[1]** Prior to the conclusion of the case in the lower Court, the appellant had knowledge of PW1's strange behaviour. It was available and could have been obtained but for the lack of reasonable diligence or effort on the part of the appellant.

**[2]** An appellate Court should not allow additional evidence to be adduced on the ground that it is alleged to have been discovered after conclusion of the case in the lower Court when such additional evidence was available at all material times.

**[3]** Furthermore, the failure of the appellant to state the nature and gist of the additional evidence and how it would be relevant to the issue involved does not assist the Court in considering the relevancy of the additional evidence sought to be adduced. The test of necessity in the interests of justice had not been met.

*[Appellant's motion dismissed.]*

**Cases referred to:**

*The Public Prosecutor v. Jeevarathnam & Ors. [1948] AIR Mad 503* ***(cons)***
*Mohamed bin Jamal v. PP [1964] 30 MLJ 254* ***(foll)***
*R v. Jordan [1956] 40 Cr App R 152*
*R v. Parks [1961] 3 All ER 633* ***(foll)***
*Che Din bin Ahmad v. PP [1976] 1 MLJ 289* ***(foll)***
*Tan Koh Keng v. PP [1962] 28 MLJ 193* ***(foll)***

**Legislation referred to:**

Criminal Procedure Code, s. 317
Criminal Procedure Code [Ind], s. 428(1)
Penal Code, s. 474

*For the Appellant - Ernest Chua; M/s. Ernest Chua & Co. Advocates*
*For the Respondent - Thomas Akin, Deputy Public Prosecutor*

**JUDGMENT**

**Chong Siew Fai J:**

This is an application by the appellant under s. 317 of the Criminal Procedure Code for leave to adduce additional evidence at the hearing of his appeal. The application by way of motion is supported by his affidavit affirmed on 5 June 1990. The additional evidence sought to be adduced is from a medical doctor and is stated to be "in regard to the mental state of the witness Achong bin Alap" (hereinafter referred to as "PW1") and his "capability in giving credible evidence at the trial" of the appellant in the Magistrate's Court.

Mr. Chua appears for the appellant and Mr. Thomas Akin represents the prosecution.

In the Magistrate's Court, the appellant was charged with the offence of abetting PW1 in the commission of the principal offence of having in possession a forged land title, knowing the same to be forged and intending that the same be dishonestly used as genuine, an offence punishable under s. 474 of the Penal Code, and PW1 was jointly charged with the principal offence. PW1 pleaded guilty to the principal offence and was accordingly convicted and sentenced. The appellant, however, claimed trial in which PW1 gave evidence for the prosecution. The appellant was found guilty, convicted and sentenced.

Section 317 of the Criminal Procedure Code gives discretional power to a Judge to admit additional evidence if he thinks it to be necessary. The clause "if he thinks it to be necessary" has been construed to mean if he thinks it necessary in the interest of justice. Whether there is such necessity depends on the facts and circumstances of each case. No hard and fast rule can be laid down. The matter is one for the discretion of the Judge, and the power has to be exercised sparingly and only in suitable cases.

Section 371(i) of the Code is materially similar to s. 428(1) of the Criminal Procedure Code 1898 of India. In *The Public Prosecutor v. Jeevarathnam & Ors.* AIR [1948] Mad. 503 it was said that the language of the section seemed to indicate cases where there being already evidence on record, the Court considered it to be unsatisfactory or where evidence on record left the Court in such a state of doubt that it considered it necessary to enable it to decide the case to have further evidence.

In *Mohamed bin Jamal v. Public Prosecutor* [1964] 30 MLJ 254 FC, Thomson LP in dealing with an application to adduce additional evidence approved the following statement of Hallett J in *R v. Jordan* [1956] 40 Cr App R 152:

> It is only in the most exceptional circumstances, and subject to what may be described as exceptional conditions, that the Court is ever willing to listen to additional evidence.

He then approved and applied the 4 principles or conditions set out in the judgment of Lord Parker CJ in *R v. Parks* [1961] 3 AER 633. They are:

> First, the evidence that it is sought to call must be evidence which was not available at the trial. Secondly, and this goes without saying, it must be evidence relevant to the issues. Thirdly, it must be evidence which is credible evidence in the sense that it is well capable of belief; it is not for this Court to decide whether it is to be believed or not, but it must be evidence which is capable of belief. Fourthly, the Court will after considering that evidence go on to consider whether there might have been a reasonable doubt in the minds of the jury as to the guilt of the appellant if that evidence had been given together with the other evidence at the trial.

In *Che Din bin Ahmad v. PP* [1976] 1 MLJ 289, Syed Agil Barakbah J observed, with which I respectfully agree, that the 4 conditions laid down in *R v. Parks, supra*, were cumulative and that the onus was on the applicant to satisfy the Court that they were fulfilled.

In the instant case, PW1, as appears from the appeal record, gave a logical, coherent and intelligent story in his evidence in the Magistrate's Court. He related how he met the appellant, and how the appellant took him to have photographs taken and used for causing identity card under the name of one "Mut Anak Pundoh" (name of the registered owner of the land) to be made. He also related their requesting Bujang Jawi (PW5) to look for a buyer for the land, that Bujang could only get a money-lender, and how he (PW1) himself, that is, without the accompaniment of the appellant, got the loan transaction completed under the assumed name of Mut Ak Pundoh, obtained the net sum of RM1,500 and distributed the same to various persons including the appellant. He could even state the various amounts he paid to them. When the turn came for cross-examining PW1, the appellant, albeit unrepresented at that stage, expressed that he understood PW1's testimony. This, to an extent, is indicative of the mental state of PW1 and his capability of giving plausible evidence. There was no contention nor even the slightest suggestion by the appellant of PW1's alleged unusual behaviour in the prison or his mental state.

Mr. Chua stepped in to represent the appellant on 22 September 1988. On 13 December 1988 and on 25 July 1989 he, on behalf of the appellant, cross-examined PW1 rather extensively during which, also, nothing was suggested of PW1's alleged abnormal behaviour in prison or of his mental condition. Again, PW1's evidence during cross-examination and re-examination was, as appears in the appeal record, clear and intelligent. Had the appellant considered the further evidence now purported to be adduced necessary, and was so minded, he had ample opportunity during the actual trial in the lower Court from 18 August 1988 to 30 January 1990 to produce the evidence but had failed to do so. It is difficult to accept that the appellant, having observed the unusual behaviour of PW1 as alleged by him, it did not at all occur to him that PW1 might be mentally unwell but needed his Counsel to so advise him, particularly considering his defence of denial.

Now, on the 4 principles or conditions adopted in *Mohamed bin Jamal v. PP, supra*, the first question is: Was the evidence sought to be adduced available at the trial? The appellant conceded that it was not. However, on the facts and circumstances I find it difficult to agree. In para. 2 of his affidavit, the appellant said to the effect that "after the hearing of the defence's case", he told his Counsel that while in the police custody with PW1, he noticed the strange behaviour of the latter, that is, banging head against the wall and drinking his own urine, and that his Counsel advised him that PW1 could well have been a mentally unsound person. This, the appellant said, prompted him on 20 January 1990, to instruct his solicitor to write to the Sarawak Mental Hospital which furnished a report certifying that apart from a spell of about 8 days when PW1 was admitted to the Sarawak General Hospital, he was confined to the Sarawak Mental Hospital from 24 January 1987 to 24 February 1987 during which he was found to be suffering from schizophrenia. The medical report also said that since his discharge, PW1 was seen regularly till 11 November 1987 when he was last seen and noted to be keeping well.

The phrase "after the hearing of the defence's case" in the appellant's affidavit is vague; but on record, the defence case closed on 19 January 1990. The appellant also did not say in his affidavit when he was in police custody. At the hearing this morning, the appellant through his Counsel could only say he was detained in 1988. He could not remember the period of his detention and the month in which he was detained though he said for about 5 days. However, from the appeal record, since warrant for the appellant's arrest remained unexecuted on 20 June 1988 and the appellant was arrested on 25 June 1988 and brought before the Magistrate's Court on 27 June 1988 when he was released on bail, it would appear that his detention was from 25 June 1988 to 27 June 1988. (see pp. 2, 3 and 42 of the appeal

record). The record also shows that Mr. Chua represented the appellant in this case from 22 September 1988 (p. 11 of the appeal record). Thus the appellant had knowledge of PW1's strange behaviour sometime before 27 June 1988; and, prior to the conclusion of this case in the lower Court, he had all the time from 22 September 1988 (date of representation by Counsel) to 19 January 1990 to inform his Counsel about the matters. He apparently did not do so and no reason was given for the failure. More importantly, the report Exh. 'X' annexed to the motion relates to PW1's mental illness or condition in 1987. Hence, this is not a case of the evidence sought to be adduced being not available at the trial in the lower Court. It was available and could have been obtained but for the lack of reasonable diligence or effort on the part of the appellant: *Tan Koh Keng v. PP* [1962] 28 MLJ 193. I do not think an appellate Court should allow additional evidence to be adduced merely because it is alleged to have been discovered after conclusion of the case in the lower Court when such additional evidence is at all material times available.

Assuming I am wrong on the first condition, the second question to consider is whether the evidence sought to be adduced is relevant to the issue. In order to ascertain its relevancy, it is necessary for an applicant to state or show the nature and the gist of the additional evidence, as in *Mohamed bin Jamal v. PP*, *supra.* In the instant case, the notice of motion asks no more than for leave "for additional evidence to be adduced". In para. 4 of his affidavit, the appellant merely stated his intention to call the doctor, the author of Exh. 'X', "to give evidence in regard to the mental state of the witness Achong bin Alap and the capability of PW1 in giving credible evidence at the trial of this case"; and para. 5 thereof states, *inter alia*, that the doctor's evidence "is relevant to the issue of whether the evidence of a schizophrenic person is reliable or not". Now, firstly, whether the additional evidence is relevant so as to allow it to be adduced is a matter for the Court. Secondly, the issue of "whether the evidence of a schizophrenic person is reliable or not", is too wide and general for the purpose of the instant case. What we are concerned with here is the evidence of a particular witness. Thirdly, the passage in para. 4 of the appellant's affidavit quoted above, that is, "to give evidence in regard to the mental state ... and the capability ... in giving credible evidence", does not in any way throw light on the relevancy of the additional evidence sought to be adduced. The nature and the substance of the evidence of the intended witness remain a matter of guess. It may be that the mental state and capability of the witness in giving credible evidence at trial in the lower Court was not affected (in which event it would not be relevant), or that he (the intended witness) is unable to express any acceptable firm opinion considering that PW1 was last seen at the Mental Hospital on 11 November 1987 and he gave evidence in August 1988, that is, some 9 months later, and the medical report Exh. 'X' stated that he was noted to be "keeping well" (in which event it would again be irrelevant), or it may be something else. The point is: without stating or in any way indicating the nature and the gist of the additional evidence sought to be adduced, the Court is unable to reasonably conclude that such intended additional evidence is relevant to the issue involved. The lack of such evidence also renders the Court unable to consider whether the evidence, if it had been given at the trial in the lower Court, might raise a reasonable doubt as to the guilt of the appellant (the 4th condition enunciated in *R v. Parks*, *supra*).

On the affidavit evidence, and the facts and circumstances of this case, and after hearing submissions by Counsel, I, for the above reasons, am not satisfied that the test of necessity in the interest of justice has been met. The motion is dismissed.

Also found at [1991] 3 CLJ 1798